Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,

Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

KALVIN M. GROVE
LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
1 ILLEGIBLE, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. BARRETT
[illegible] Berkeley Street
Boston, Massachusetts 02226

CLEON H. KNOX
[illegible] Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

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In reply to the brief of Respondents, Petitioner Liberty Mutual Insurance Company (hereafter "Liberty" or the "Company") states:

1. In its principal brief (pp. 7-15) Liberty demonstrated that in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974) this Court resolved the threshold question herein, determining that a pregnancy exclusion in a disability income plan does not constitute gender discrimination *per se*. Respondents do not contest that assertion,[1] but instead rely primarily on a result-oriented theory,

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1. Respondents do attempt to obfuscate the applicability of *Geduldig* by pointing out (p. 22) that *Geduldig* dealt with a "constitutional attack under the Equal Protection Clause." That

predicated upon an interpretation of *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), to support their contention that they have established a *prima facie* case. See Resp. br., pp. 8, 11. Liberty submits that Respondents seek to misapply *Griggs*, and have not established a *prima facie* case.

2. If an employer failed to similarly insure males and females against the same risk, there would be a *prima facie* case of discrimination, shifting the burden of proof to the employer. Such a case would be closely analogous to *McDonnell Douglas* v. *Green*, 411 U. S. 782 (1973). Here, however, the situation is, as it was in *Geduldig*, markedly different, and, accordingly, so must the requisite allocation of proof. In *Geduldig* this Court recognized "the lack of identity between the excluded disability [pregnancy] and gender as such. . . ." 417 U. S. at 496-497 n. 20. Notwithstanding, therefore, whether pregnancy is included or excluded from the covered risks under an insurance program, there is:

> . . . no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. 417 U. S. at 496-497 (footnote omitted).

In such circumstances, without more, no basis exists for a claim that there is a discriminatory employment practice. Stated

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contention, however, does not further their cause. As Judge Widener stated in dissent in *Gilbert et al* v. *General Electric Company* (..... F.2d ..... (4th Cir. 1975), *cert. granted* No. 74-1589):

> The inquiry in this case must therefore focus initially on whether exclusion of pregnancy related disability from the disability benefits plan is sex discrimination. If it is not sex discrimination, then, regardless of what test is applied there is no Title VII violation. . . . Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause would not render unlawful a pregnancy exclusion such as that involved here.

See also Comment, *Geduldig* v. *Aiello*: *Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Col. L. Rev. 441, 466-468 (1975). Hence, if the exclusion of pregnancy in *Geduldig* was not discrimination based on gender "as such," it may not become discrimination "as such" under the Act.

differently where, as here, both men and women are protected from the same risks, and the challenge is, as it was in *Geduldig* (*id.* at 494), to the "underinclusiveness of the set of risks" for which protection is offered, a plaintiff can not rely, as was done in this case, solely on establishing that an insurance exclusion impacts on men and women unequally. Otherwise the exclusion of any risk, except those risks, if any, which affect men and women identically, would be prohibited.

3. The appropriate test to determine the legality of an employer's insurance program requires an evaluation of the parity of economic benefits afforded its employees. If, as here, an employer pays equal insurance premiums on behalf of every employee—both men and women—, and provides for equal benefits for each employee for the same risks, a violation of the Act cannot be assumed, as Respondents would contend, because the employer is providing all that the Act requires—equality. Instead the burden of proof remains on a plaintiff to utilize the discovery powers provided in the federal courts to demonstrate under *Griggs* that an employer's insurance policy denies a protected group its proportional share of the total benefits actually disbursed to employees. Here the evidence is undisputed that the benefits available to, and the premiums paid on behalf of each employee—male or female—are determined by the identical formula. See Lib. Prin. br., p. 2 n. 2. Accordingly, in the absence of any evidence that the distribution of aggregate benefits is disproportionately weighted in favor of either men or women, plaintiffs' assertions under *Griggs* must be dismissed. To construe *Griggs* otherwise would require that a greater economic benefit be provided to one group whenever there are actual biological differences. *Griggs*, it is submitted, does not require such preferential treatment to compensate for differences that in fact exist. See Lib. Prin. br., p. 23, n. 45.

4. Finally, Respondents have attempted to obfuscate the legal analysis of the issue before this Court by referring to other issues litigated below. While Liberty was found guilty of

certain past violations of the Act, the District Court has expressly held that Liberty's current system complies with the Act, except for the single policy presented herein, so that no injunctive relief is necessary.[2] In the absence of either a finding by the District Court that the disputed exclusion is "pretextual", or an appeal by Respondents from the District Court's failure to make such a finding, Respondents are barred from relying on such a contention here. The sole issue presented in the instant matter is the application of *Griggs* to insurance protection.

5. In conclusion for all of the foregoing reasons and those reasons presented in its principal brief, Liberty requests that the judgment of the Court of Appeals be reversed insofar as it affirmed the District Court's grant of summary judgment and found Liberty's disability income protection plan is violative of the Act.

Respectfully submitted,

KALVIN M. GROVE
LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

2. See. Lib. prin. br., p. 4 n. 6. Subsequent to the filing of Liberty's principal brief the District Court found that Liberty's leave policy is in compliance with the Act. See Appendix A hereto.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

SANDRA WETZEL and MARI ROSS on behalf of themselves and all other persons similarly situated, *Plaintiffs,* vs. LIBERTY MUTUAL INSURANCE COMPANY, a corporation, *Defendant.*	Civil Action No. 72-169

MEMORANDUM ORDER.

* * * * *

We were informed by letter of the defendant dated November 10, 1975, that the defendant changed its maternity leave policies in accordance with the opinion of this court as affirmed by the Court of Appeals. This was not a matter covered by the pending appeal to the Supreme Court. The letter of November 10, 1975, indicates that the company's maternity leave of absence policy will now be as follows:

> "Pregnancy leave of absence will expire on the date that it is medically determined that the employee is able to work."

While the plaintiff moved for a mandatory injunction requiring the defendant to abide by a non-discriminatory pregnancy leave policy, it does not appear that any such injunction is necessary in view of the announcement of the defendant that it will abide by the terms of the Opinion of the Court of Appeals that defendant must provide leave for pregnancy on the same basis

as it does for other temporary disabilities. We find no merit to the objection voiced in a letter of plaintiff's counsel to this court that this policy is retaliatory because it may provide for a shorter period of disability than the arbitrary 90 days limit for return to work after delivery previously enforced by the defendant company, which was condemned by the court as discriminatory. All that the opinions of this court and the circuit court have required is that pregnancy leave of absence be determined in the same manner as leave of absence for any other temporary disability. All that is required of the defendant is the filing with the Clerk of this court of some evidence of compliance with this mandate. If no such evidence is filed an application for a mandatory order from the plaintiff may be considered.

ORDERED filed this 10th day of December, 1975.

/s/ GERALD J. WEBER
Gerald J. Weber
United States District Judge

cc: HOWARD SPECTER, ESQ.
Grant Building
Pittsburgh, Pennsylvania 15219

KALVIN M. GROVE, ESQ.
Sears Tower, Suite 7916
233 South Wacker Drive
Chicago, Ill. 60606

CLEM R. KYLE, ESQ.
4140 U. S. Steel Building
Pittsburgh, Pa. 15219

ROBERT A. PENNEY, ESQ.
175 Berkeley Street
Boston, Mass. 02226

BETH L. DON, ESQ.
Equal Employment Opportunity Commission
2401 E. St. N. W.
Washington D. C. 20506